(3)

Supreme Court, U.S.
FILED
APR 24 2002
OFFICE OF THE CLERK

No. 01-1437

IN THE

Supreme Court of the United States

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,

Appellants,

v.

JOHN ROBERT SMITH; SHIRLEY HALL; and GENE WALKER,

and

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

SUPPLEMENTAL BRIEF

ROBERT B. MCDUFF *
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLTON W. REEVES
PIGOTT, REEVES, JOHNSON & MINOR
P.O. Box 22725
Jackson, Mississippi 39225-2725
(601) 354-2121

Counsel for Appellants

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

14pp

SUPPLEMENTAL BRIEF

The Federal District Court's injunction against the state court congressional redistricting plan was based on (1) the District Court's holding that preclearance under Section 5 of the Voting Rights Act had not been obtained, and (2) its additional holding that even if preclearance is obtained, the courts of Mississippi have no power to act in matters of congressional redistricting in light of Article I, § 4 of the United States Constitution. Consistent with Rule 18.10, this supplemental brief is submitted to inform the Court of events since the filing of the Jurisdictional Statement that bear on the preclearance question and provide additional support for our contention that the plan has been precleared.

As noted in the Jurisdictional Statement, the United States Department of Justice on February 14 requested more information regarding the Section 5 submission that included the state court plan. The District Court held that this request invalidated the original sixty day statutory review period. Even if that holding is correct, the review period was restarted on February 19 when the Mississippi Attorney General submitted the additional information. Subsequently, on April 22, 2002 — which was the first weekday after the sixtieth day after February 19 — the renewed sixty-day period expired without any objection by the United States Attorney General. Thus, even if the plan had not previously been precleared, it was precleared as of April 23.

Other than the February 14 request for more information, the only formal communication from the United States Department of Justice (DOJ) regarding the Section 5 submission came in a letter to the Mississippi Attorney General dated April 1, 2002. In that letter, the Chief of the Voting Section of the Civil Rights Division acknowledged that the additional information was received on February 19-20. However, the letter also stated that, in light of the District Court's Article I, § 4 holding, "it would be inappropriate for the

Attorney General to make a determination concerning [the] submission now." The letter said: "Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General." The letters added that "[i]f the injunction against implementation of these changes is lifted, . . . the Attorney General will again consider these changes for preclearance." App. 9a.

On April 23, after the renewed sixty-day period expired, we filed in the District Court a motion to declare that the state court plan is now precleared under Section 5. That motion is reproduced in the appendix to this supplement. App. 1a. Attached to the motion was the April 1 letter, which also is reproduced here. App. 8a. (The February 19 submission of more information also was attached to the District Court motion. Because it was reproduced in the appendix to the jurisdictional statement, J.S. App. 200a, it is not included here).

In that motion, we contend that the District Court's Article I, § 4 holding does not postpone the statutory sixty-day review period. Section 5 provides that when any covered state "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it receives the requisite federal preclearance "if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ." The State of Mississippi, through its courts, has "enact[ed] or seek[s] to administer"the state court redistricting plan. The District Court's holding to the effect that the Mississippi courts do not have that power as a matter of federal constitutional law

does not change the fact that the state courts have "enact[ed]" or "seek to administer" the state court plan. While the April 1 DOJ letter claims that the plan is not "capable of administration," Section 5's language does not require that it be capable of administration — but simply that the state authorities "enact or seek to administer" it. Given the absence of an objection within this second sixty-day period, the plan clearly has been precleared.

Once the District Court rules on this motion, we will inform this Court. Irrespective of the District Court's action, the injunction that it issued, based in part on Article I, § 4, will remain in place. Given that it is the injunction that is being appealed, no new notice of appeal will be necessary once the District Court rules. This appeal will remain. At the very least, this Court will be required to resolve the constitutional issue. Accordingly, this Court should go forward and note probable jurisdiction. To the extent the District Court's ruling affects the status of the Section 5 issue, the parties can brief the merits in light of whatever decision that court makes.

Respectfully Submitted,

*ROBERT B. MCDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLTON W. REEVES
PIGOTT, REEVES, JOHNSON & MINOR
775 North Congress Street
Jackson, Mississippi 39202
(601) 354-2121

Counsel for Appellants

*Counsel of Record

APPENDICES

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

JOHN ROBERT SMITH, SHIRLEY HALL, and GENE WALKER,
Plaintiffs,

vs. **No. 3:01cv855**

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,
Defendants,

and

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,
Intervenors.

INTERVENORS' MOTION TO DECLARE THAT THE STATE COURT PLAN IS NOW PRECLEARED UNDER SECTION 5 OF THE VOTING RIGHTS ACT

[filed April 23, 2002]

This Court's February 26 injunction against the state court congressional redistricting plan was based on (1) the holding that preclearance under Section 5 of the Voting Rights Act had

not been obtained, and (2) the additional holding that even if preclearance is obtained, the courts of Mississippi have no power to act in matters of congressional redistricting in light of Article I, § 4 of the United States Constitution. Because of intervening events, we contend that the plan has now unquestionably been precleared. Accordingly, we move this Court to declare that it is precleared. Although the injunction will remain in place in light of the constitutional holding, a holding that the plan has been precleared will narrow the issues in the pending appeal before the United States Supreme Court.

Section 5 provides that a redistricting plan is precleared if "the [United States] Attorney General has not interposed an objection within sixty days after [the] submission" of the plan. 42 U.S.C. § 1973c. A second sixty-day review period under Section 5 has now passed without an objection by the Attorney General. While the Department of Justice claimed in an April 1, 2002 letter that this Court's federal constitutional ruling renders the state court plan incapable of administration, and therefore "not ripe" for Section 5 review, the language of Section 5 does not allow for postponement of the sixty day period on that ground. Thus, the plan has been precleared.

This Court's February 26 order specifically retained jurisdiction of this case. Although the injunction has been appealed to the Supreme Court, this Court has the authority to resolve matters that arise in the interim. At present, the injunction is based both upon the constitutional ruling and the Section 5 ruling. We contend that intervening events require the Section 5 ruling to be vacated. This Court should promptly address the matter in the first instance. Although the Supreme Court appeal will remain in place irrespective of this Court's decision on the matter, that decision will affect the scope of the appeal. For example, if this Court declares the plan now

precleared, the Supreme Court likely will not need to address any of the additional Section 5 issues that presently are raised in the appeal.

In further support of this motion, the following is submitted:

On February 14, 2002, the United States Department of Justice requested more information regarding the State's December 26, 2001 submission under Section 5. The Mississippi Attorney General submitted that information on February 19, 2002. The United States Department of Justice contended that this request restarted the original sixty day statutory review period under Section 5 once the additional information was submitted. Over the intervenors' objection, this Court agreed. On February 26, 2002, with no decision having been made by the United States Attorney General under Section 5, this Court enjoined implementation of the state court congressional redistricting plan that had been included in the December 26 submission.

Even if this Court was correct that the February 14 request for more information invalidated the original sixty day statutory review period, the review period was restarted on February 19 when the Mississippi Attorney General submitted the additional information. That period expired on or before April 22, 2002, which was the first weekday after the sixtieth day after February 19. Under the terms of Section 5, the state court plan "may be enforced" if "the Attorney General has not interposed an objection within sixty days after [the] submission" of the plan. Because the Attorney General has not interposed an objection on or before April 22, the plan has been precleared.

Other than the February 14 request for more information,

the only formal communication from the United States Department of Justice to the Mississippi Attorney General regarding the Section 5 submission came on April 1, 2002. In a letter dated that day, the Chief of the Voting Section of the Civil Rights Division acknowledged that the additional information was received on February 19-20. However, the April 1 letter also stated that, in light of this Court's Article I, § 4 holding, "it would be inappropriate for the Attorney General to make a determination concerning [the] submission now." The letter said: "Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General." The letters added that "[i]f the injunction against implementation of these changes is lifted, . . . the Attorney General will again consider these changes for preclearance." (A copy of the April 1 letter is attached as Exhibit 1. A copy of the February 19 submission of the additional information is attached as Exhibit 2).

However, this Court's Article I, § 4 holding does not postpone the statutory sixty-day review period. Section 5 provides that when any covered state "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it may obtain the requisite federal preclearance "if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ." The State of Mississippi, through its courts, has "enact[ed] or seek[s] to administer"the state court redistricting plan. This is reflected in the Mississippi Supreme Court's December 13, 2001 ruling and the December 21

opinion and order of the Chancery Court of Hinds County. This Court's holding to the effect that the Mississippi courts do not have that power as a matter of federal constitutional law does not change the fact that the state courts have "enact[ed]" or "seek to administer" the state court plan.

Although the April 1 Department of Justice stated that the plan is not "presently capable of administration" because of this Court's constitutional injunction, Section 5 does not require that the plan be "capable of administration." It simply requires that the state authorities "enact or seek to administer" the plan. Once the plan is submitted, the statutory sixty day review period begins. Nothing in the statute allows the Attorney General to postpone the sixty day period simply because a federal court enjoins the plan on federal constitutional grounds.

In *Morris v. Gressette*, 432 U.S. 491 (1977), the Supreme Court noted that under Section 5, a covered jurisdiction may preclear a voting change by obtaining a declaratory judgment from the Federal District Court for the District of Columbia or, alternatively, "may submit [the] change . . . to the Attorney General and subsequently may enforce the change if 'the Attorney General has not interposed an objection within sixty days after such submission.'" *Id.* at 502. Under this alternative method, said the Court, "compliance with § 5 is measured solely by the absence, for whatever reason, of a timely objection on the part of the Attorney General." *Id.* The Court added:

> We think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to

> come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be "no dragging out" of the extraordinary federal remedy beyond the period specified in the statute.

Id. at 504. Also, the Court pointed out that "the Attorney General's failure to object is not conclusive with respect to the constitutionality of the submitted state legislation." *Id.* at 505.

Thus, the Supreme Court recognized that federal courts might enjoin voting changes on constitutional grounds independent of any Section 5 review. At the same time, the Court said review by the Attorney General must provide an "expeditious" means of preclearance and may not be "'dragg[ed] out' . . . beyond the period specified in the statute." This strongly indicates that a constitutional injunction does not postpone the statutory sixty day review period.

The need for a prompt decision on a Section 5 submission, independent of any constitutional injunction, is illustrated by the fact that "States must often redistrict in the most exigent circumstances." *Growe v. Emison*, 507 U.S. 25, 35 (1993). If a federal court enjoins a redistricting plan on constitutional grounds, the injunction is subject to being vacated on appeal, perhaps through emergency review. However, if the United States Attorney General can postpone the sixty day period when an injunction is entered, the covered jurisdiction will be unable to implement the plan promptly even if the injunction is vacated. The jurisdiction will be required to await renewal and completion of the interrupted Section 5 review process. The language of Section 5 does not allow for this sort of delay.

Of course, if the Attorney General is unable — as we contend — to postpone the sixty period, there is the possibility that the completion of the Section 5 review process will have been in vain if the constitutional injunction is not lifted on appeal. But if Congress had believed this to be a problem, it would have written the statute to stop the sixty day period when such an injunction was issued. It did not do so, and the statutory terms of Section 5 do not allow for suspension of the review period on this basis.

In light of the foregoing, this motion should be granted.

Respectfully submitted,

/s/ Robert B. McDuff
ROBERT B. McDUFF
Miss. Bar No. 2532
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

/s/ Carlton W. Reeves
CARLTON W. REEVES
Miss. Bar No. 8515
PIGOTT, REEVES, JOHNSON & MINOR, P.A.
P.O. Box 22725
Jackson, MS 39225-2725
(601) 354-2121

Counsel for Intervenors

APPENDIX B

U.S. Department of Justice

Civil Rights Division

JDR:RSB:TCH:RJD:nj
DJ 166-012-3
2001-4084

Voting Section
950 Pennsylvania Avenue, Room 7254
Washington, D.C. 20530

April 1, 2002

The Honorable Michael Moore
Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205-0220

Dear Mr. Attorney General:

This refers to the Orders dated December 21 and 31, 2001, of the Chancery Court of Hinds County in *Branch v. Clark* adopting a 2001 congressional redistricting plan and the Order dated December 13, 2001, of the Supreme Court of Mississippi in *In Re Mauldin*, authorizing the Chancery Court to adopt a congressional redistricting plan, for the State of Mississippi, submitted to the Attorney Gneral pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our February 14, 2002, request for additional information on February 19-20, 2002.

We understand that the federal court in *Smith v. Clark* (S.D. Miss.) has found the changes effected by the Orders in

Branch v. Clark, and *In Re Mauldin*, to be unconstitutional under Article I, Section 4 of the United States Constitution, and has enjoined their implementation on that basis. We further understand that applications for an emergency stay have been sought and denied by the United States Supreme Court, but that an appeal remains pending. Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General. Accordingly, it would be inappropriate for the Attorney General to make a determination concerning your submission now. *See Procedures for the Administration of Section 5* (28 C.F.R. 51.22(a), 51.35). If the injunction against implementation of these changes is lifted, upon notification, the Attorney General will again consider these changes for preclearance unless the state notifies us of its intent to alter them. Any documentation previously provided need not be resubmitted. Refer to File No. 2001-4084 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

/s/ Joseph D. Rich
Joseph D. Rich
Chief, Voting Section